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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1434

PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Public Interest Research Group, Environmental Law Institute, Michael A. Aisenberg and Paul F. Macri ("PIRG") hereby pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the First Circuit entered in this case on August 18, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-15a) is not yet reported.* The opinions of the Federal Communications Commission are reported at 40

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* A copy of the Joint Appendix filed with the First Circuit is being lodged with the Clerk of this Court for the convenience of the Court.

FCC2d 115 (App. B, *infra*, pp. 16a-22a), 48 FCC2d 615 (App. C, *infra*, pp. 23a-27a) and 49 FCC2d 411 (App. D, *infra*, pp. 28a-29a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, or the National Environmental Policy Act of 1969, when it ruled that the fairness doctrine is inapplicable to product advertising.

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the

> presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[1]

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . . (F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment.

STATEMENT OF THE CASE

This case concerns a seminal ruling of the Federal Communications Commission ("FCC" or "the Commission") that if radio and television advertising promotes products which have a demonstrable adverse environmental impact and are a threat to public health and

[1] This italicized portion is referred to as a licensee's fairness doctrine obligation.

safety, then even though the sale and use of such products is a concededly controversial issue of public importance in a community, neither the fairness doctrine as codified in Section 315 of the Communications Act nor the National Environmental Policy Act of 1969 ("NEPA") requires that the public be exposed to contrasting views on the controversy.

In late 1972 and early 1973, station WMTW-TV, Poland Spring, Maine, aired hundreds of ads that urged the sale and use of snowmobiles at a time when the state legislature and the people of Maine were embroiled in a controversy to regulate, for the first time, the sale and use of these machines. These ads argued that snowmobiles were fast, power-packed vehicles that ran quietly and safely over mountain trails and hilly wilderness terrain, thus affording the type of family fun and entertainment that makes winter "just one big fun-filled season." (p. 3a, n. 2). When the station refused the request of three Maine residents to afford a reasonable opportunity for the presentation of contrasting views on the controversial and publicly important issue of snowmobile purchase and use, they complained to the FCC that the station was acting in violation of the fairness doctrine as codified in Section 315 and as incorporated by NEPA.[2]

The Maine residents argued and comprehensively documented the fact that snowmobiles are luxury vehicles which pose significant safety dangers to their riders and passers-by; that they create a serious adverse environmental impact which results in the death of wild-

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[2] The Maine residents did *not* request that counter-ads or similar spot programming be aired. They urged only that some "reasonable opportunity" for hearing opposing views be afforded, be that by newscasts, public affairs shows, documentaries, interview programs, etc. In short, the broadcaster was afforded under the fairness doctrine enormous latitude to decide the format and spokespersons for the presentation of opposing views.

life and destruction of vegetation; and that they invade the privacy rights of other land users and home owners. The Maine residents catalogued the extensive nature of the snowmobile controversy: the United States Subcommittee on Parks and Recreation had held hearings on snowmobiling; President Nixon had ordered the curtailment of the use of these vehicles on public lands; the United States Department of the Interior had proposed rules restricting snowmobile use in national forests and parks (including many in Maine); the Maine legislature was considering for the first time legislation to limit both the types of snowmobiles which could be bought and the zones in which they could be used; and there were heated public meetings throughout Maine sponsored by governmental and private bodies to debate the proposed legislation and arrive at a solution to the problems associated with snowmobiling.

The Maine residents noted that the snowmobile controversy was discussed in *Consumer Reports*, *Sports Illustrated*, numerous environmental publications and, most significantly, Maine newspapers and stations other than WMTW-TV. For example, the complainants quoted from the headline story in the December 3, 1972 *Maine Sunday Telegram*, the state's largest Sunday paper, entitled "Snowmobiles: New Laws Needed?":

> When it comes to snowmobiles, people generally have pretty strong opinions one way or another. Depending upon your point of view snowmobiles are:
>
> —Noisy and dangerous contraptions that destroy both property and peace of mind, or . . .
>
> —Wonder machines promoting family fun and freeing body and spirit to explore once inaccessible delights of nature.

The Maine residents argued that by failing to provide a reasonable opportunity for the presentation of views con-

trasting with those in the snowmobile ads,[3] WMTW-TV was in violation of the fairness doctrine. Specific reliance was placed upon *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *Federal Communications Commission*, 396 U.S. 842 (1969) (*"Banzhaf"*); *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248 (D.C. Cir. 1970) (*"Retail Store"*); *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (D.C. Cir. 1971) (*"Friends"*); and *Neckritz* v. *Federal Communications Commission*, 502 F.2d 411 (D.C. Cir. 1974) (*"Neckritz"*).

The Commission's staff, without even examining the texts of any snowmobile ads, ruled that the fairness doctrine did not apply to "ordinary product commercials" which "advance a claim for product efficacy or social utility." (p. 20a).[4] The Commission affirmed the staff decision, ruling that "all product advertising extolls the virtues of the product in order to convince the public to buy." (p. 25a). While the Commission conceded that the purchase and use of snowmobiles may constitute a controversial issue of public importance in Maine, it stated that the snowmobile ads were merely "standard

[3] The only programming aired by WMTW-TV which provided views contrary to those in the snowmobile ads was a one-half-hour interview program featuring opponents and proponents of the bills in the Maine legislature. There is no question that if the hundreds of snowmobile ads give rise to fairness obligations, the station's single program was insufficient to meet its duty to present opposing views. *See, e.g., Citizens for Responsible Government—KTOW*, 25 FCC2d 73 (1970). Neither the Commission nor the First Circuit reached the question of whether the station met its fairness obligation because they both found the fairness doctrine inapplicable.

[4] The terms "ordinary product commercials" or "standard product commercials" were used extensively by the Commission and the lower court. These terms do not mean that the product being promoted is not highly controversial. Rather, they are used generically to describe ads for both controversial and non-controversial products.

product commercials" which were not "devoted in an obvious and meaningful way" to the discussion of that issue. (p. 26a). It rejected the claims that Section 315 and the cases cited by the Maine residents require an opposite result, noting that in its *1974 Fairness Report*, 39 Fed. Reg. 26372 (July 18, 1974), the Commission had expressly disowned the Court of Appeals decisions in *Banzhaf* and its progeny. In its initial ruling and in an opinion denying reconsideration (pp. 28a-29a), the Commission failed to discuss the arguments of the Maine residents and PIRG that NEPA required that the fairness doctrine be applied to the snowmobile ads.

Upon a petition for review filed by PIRG, pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), the United States Court of Appeals for the First Circuit affirmed the Commission's ruling that snowmobile commercials were usual product ads which "contribute '*nothing* to public understanding' " and thus could not "reasonably be said to inform the public on any side of a controversial issue of public importance." (p. 9a) (emphasis added). Consequently, the First Circuit agreed with the Commission that the fairness doctrine was inapplicable because standard product ads are not "devoted in an obvious and meaningful way" to a discussion of any controversy—here, the snowmobile controversy in Maine. The First Circuit recognized the Commission's decision was inconsistent with prior Commission and court rulings on standard commercials for other controversial products, but it found that the Commission could reject the prior rulings without violating either Section 315 or NEPA.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Decision Is In Conflict With Both Prior Decisions of the U.S. Court of Appeals for the D.C. Circuit Which Addressed the Same Issues[5] and With Decisions of This Court Which Rejected the Rationale Adopted by the First Circuit.

A. *The First Circuit's Decision Conflicts With Decisions of the D.C. Circuit.*

The First Circuit explicitly stated that the Commission's decision in this case was contrary to the interpretation of the fairness doctrine as expressed in three decisions of the D.C. Circuit. *Banzhaf, supra; Friends, supra*; *Neckritz, supra.*[6] It rejected the argument that there are statutory or constitutional barriers to the Commission's abandonment of these precedents.[7]

In *Banzhaf, supra*, the D.C. Circuit upheld the Commission's ruling that because product ads for cigarettes argued the desirability of smoking, the fairness doctrine

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[5] The July, 1974 *Fairness Report* does not dispel the very real conflict between the D.C. Circuit decisions holding that product commercials are subject to the fairness doctrine and the First Circuit decision that they are not. The underlying issue remains unchanged: whether Section 315 and the public interest standard of the Communications Act require application of the fairness doctrine to product ads which raise one side of a controversial issue of public importance. Moreover, the Commission based its decision on Commission precedent which pre-dated the *Fairness Report*, observing that the *Fairness Report* merely affirmed prior policy. (p. 26a).

[6] The lower court did not discuss *Retail Store, supra*, which was cited by PIRG.

[7] PIRG's constitutional argument was that the First Amendment precluded the Commission from extinguishing the rights of the public to receive information on opposing sides of the snowmobile controversy. Of course, the public interest standard of the Communications Act refers to the same First Amendment principles. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973).

and Section 315 required the presentation of contrasting views.[8] The court affirmed the Commission's statement that the "ruling is really a simple and practical one, *required* by the public interest" standard of the Communications Act. 405 F.2d at 1092 (emphasis added).

When the Commission refused to apply the fairness doctrine to product commercials which urged the patronage of a local department store at the same time that a mass boycott had been arranged by a striking labor union, the D.C. Circuit in *Retail Store, supra,* relied on *Banzhaf* in rejecting the FCC's argument that the fairness doctrine was inapplicable to product ads.[9] The court also found that just as the public interest standard interpreted in *Banzhaf* must include consideration of the public health, that same standard must be deemed to incorporate the "public policy" of equalizing the "economic bargaining power between workers and their employers" that is guaranteed in the National Labor Relations Act. 436 F.2d at 259.

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[8] The Commission ruled that "[t]he advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health." *WCBS-TV,* 8 FCC2d 381, 382 (1967), quoted in *Banzhaf, supra,* 405 F.2d at 1086.

[9] The court remanded the case to the FCC with the following guidelines: "Central to the Union's argument . . . is the proposition that, in urging listeners to patronize [the store], [the advertiser] presented one side of a controversial issue of public importance. [The store's] copy, *of course,* made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question—they urged the public to patronize the store, i.e., not to boycott it. It seems to us an inadequate answer to this argument merely to point out that [the store's] copy made no specific mention of the boycott." 436 F.2d at 258 (emphasis added).

Subsequently, in *Friends, supra*, the D.C. Circuit overturned a Commission decision which refused to apply the fairness doctrine to product ads for large automobiles which were aired on New York City stations at the time the city was considering several controversial alternative plans for the alleviation of severe pollution and transportation crises.[10]

Finally, in upholding the FCC's refusal to apply the fairness doctrine to product ads for Chevron F-310 gasoline, the D.C. Circuit merely stated that the complainants did not clearly articulate the controversial issue which they alleged was discussed in the ads. *Neckritz, supra*, 502 F.2d at 417-418. Refusing to accept the FCC's broader argument—accepted in this case by the First Circuit—that product efficacy or social utility could never be a controversial issue of public importance and that product ads do not contribute to debate on such controversies, the D.C. Circuit strongly reaffirmed its prior rulings in *Banzhaf* and *Friends* that the fairness doctrine must be applied to ordinary product ads which make an "attempt to glorify conduct or products which endanger public health or contribut[e] to pollution." *Id.* at 418.

Despite the four D.C. Circuit cases argued to the First Circuit, the lower court determined that those contrary decisions were not binding on the Commission. Hence, this Court should review the First Circuit decision to resolve the existing conflict.

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[10] The D.C. Circuit stated that "commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance." 449 F.2d at 1169.

B. *Decisions of This Court Confirm That, Contrary to the Rulings By the FCC and First Circuit, Ordinary Product Advertisements Do Contain Messages on Controversial Issues.*

The First Circuit also affirmed the Commission's ruling on the grounds that "standard product commercials" cannot be "devoted in an obvious and meaningful way" to the discussion of controversial issues. (p. 5a). Or, as the Commission stated, "standard product commercials" merely "advocate the use of one product over another" and cannot constitute an issue of public importance. (p. 26a). However, in approving the Commission's decision that such commercials "contribute 'nothing to public understanding'" (p. 9a), the First Circuit ignored important precedent of this Court which undermines the rationale that standard product advertising cannot contain messages on controversial matters.

While this Court has never addressed the matter of the application of the fairness doctrine to product advertising, its first discussion of the fairness doctrine reaffirmed the right of the public to receive opposing views on all controversial issues of public importance raised in a station's programming. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969) ("*Red Lion*"). Later in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 412 U.S. 94, 128 (1973), this Court gave express recognition in the context of the fairness doctrine to the "effects of the ubiquitous commercial":

> Broadcast *messages* . . . are 'in the air'. . . . It is difficult to calculate the subliminal impact of this *pervasive propaganda*, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word. *Id.*, quoting from *Banzhaf*, *supra*, 405 F.2d at 1100-1101 (emphases added).

In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), Mr. Justice Brennan, joined by Mr. Justice Stewart, Mr. Justice Marshall and Mr. Justice Powell, stated that "commercial advertising . . . often communicate[s] information and ideas found by many persons to be controversial." *Id.* at 314 (dissenting opinion).[11] In fact, Mr. Justice Brennan gave what he considered to be an important example, clearly applicable in the fairness context of this case, of how the ordinary product ad can involve "controversial or unsettling speech" when he referred to the unfairness of

> [an] instance, [in which] a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. *Id.* at 317.[12]

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[11] The Court's prevailing plurality opinion differed from the dissenting opinion only on the question of whether advertising space on a public bus constituted a public forum. The prevailing plurality opinion did not take issue with Mr. Justice Brennan's characterization of commercial advertising as imparting information on controversial matters. Mr. Justice Douglas concurred with the prevailing plurality on a different ground, but he too recognized that "[c]ommercial advertisements may be as offensive and intrusive . . . as any political message." 418 U.S. at 308.

[12] Mr. Justice Brennan's characterization of snowmobiles finds support in this record. For instance, in both the complaint to the FCC and brief to the First Circuit, petitioners quoted the Executive Director of the Maine Audubon Society:

> [this] advertising convince[s] buyers that owning a snowmobile provide[s] free access to the whole world regardless of who own[s] the land. Any limit on when or where or how fast they [i.e., snowmobilers] can run their snowmobile is a direct attack on the *'freedom to explore winter'* that they have supposedly purchased along with their machine. "Snowmobiles: Pressure for Restrictions," *Maine Times*, September 15, 1972 at p. 6.

In their brief to the First Circuit, petitioners noted: "With snowmobile clubs constantly being formed, new snow areas rapidly

The rationale expressed by Mr. Justice Brennan's opinion in *Lehman* concerning the nature of product advertising was utilized by this Court in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Stating that ads for an abortion clinic "involve[d] the exercise of the freedom of communicating information and disseminating opinion," this Court specifically noted that

> [v]iewed in its entirety, the advertisement conveyed *information* of a potential interest and value to a diverse audience—not only to readers possibly in need of the service offered, *but also those with a general curiosity about, or genuine interest in, the subject matter* or the law of another State and its development, *and to readers seeking reform in Virginia*. *Id.* at 822 (emphases added).[13]

Thus, in direct contrast to the rationale now recognized by this Court, the First Circuit agreed with the Commission that the snowmobile commercials were usual product ads which "contribute '*nothing* to public understanding'" and could not "reasonably be said to inform the public on *any* side of a controversial issue of public importance." (p. 9a) (emphases added).[14] The snow-

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opening up, races frequently being held, and *vigorous advertising*, snowmobiling has become part of the northern culture. . . ." "Product Injury Review—Snowmobiles," 2 CCH Consumer Product Safety Report ¶ 41,004, p. 28,014 (Dec. 1972) (emphasis added).

[13] *See also Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974) (3-Judge Court), *cert. granted*, 420 U.S. 971 (1975) which recognized that price information in an ordinary product ad may, at times, be sufficiently important so that the First Amendment prevents any prohibition on its dissemination.

[14] The Commission and the lower court both ignored both the realities of advertising and of the governmental decision-making process. *No* ad for any product would ever argue that the negative claims made by the product's opponents were wrong; surely cigarette ads did not contend that cigarettes were not harmful to the health. *Cf. Retail Store, supra*, 436 F.2d at 258 ("[the store's] copy, *of course*, made no mention of the strike or boycott") (emphasis

mobile ads argued for the sale and use of a product which was the subject of several proposed bills in the state legislature that sought to impose *some* controls on a previously unregulated product, which President Nixon and the Department of the Interior ordered banned from public lands (many of which are in Maine), which

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added). Rather, all product ads emphasize the positive aspects of using the product—be they status, comfort, exercise or mere enjoyment of use. Indeed the sole purpose of product advertising is to communicate information in favor of a product as the numerous authorities cited by PIRG to the First Circuit recognize: *e.g.*, Colley, *Defining Advertising Goals for Measured Advertising Results* (New York: Assoc. of National Advertisers, 1961) p. 21; Holbrook, "A Review of Advertising Research," Appendix B to a Federal Trade Commission Report, No. 3-0420, *Advertising and the Public Interest*, April 20, 1973; Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 Pub. Opin. Quarterly 349 (1966); Krugman and Hartley, *Passive Learning From Television*, 34 Pub. Opin. Quarterly 184 (1970).

Moreover, the positive aspects of a product, such as cigarettes or snowmobiles, as promoted by commercial messages, and the negative or harmful aspects, as pointed out by environmental or other concerned groups, constitute the very factors which must be weighed by legislators in making their determination whether the potential harm outweighs the benefit sufficiently to justify regulating the product or banning it completely. To say, as the FCC and the First Circuit have done, that these product messages are not "meaningful" or do not "obviously" promote the product's use is to overlook one of the key factors in this balancing process. Thus, when the lower court ruled that the application of the fairness doctrine to product ads would leave the public informed on only one side of the controversy (i.e., the anti-product side), it erred in refusing to recognize that the exact opposite is true—that the public is left informed on only one side (the pro-product side)—when the fairness doctrine is not applied to those ads which promote products that are demonstrably dangerous to safety, health and the environment and thus the subject of a controversial issue of public importance in the licensee's community. *Cf. Yale Broadcasting Co.* v. *Federal Communications Commission*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) wherein the D.C. Circuit agreed (consistent with its product ad-fairness decisions) with the FCC's ruling that records which "glorify the use of illegal drugs" *do* present messages and information to youth, 31 FCC2d 377, 378, unless they are "virtually unintelligible" or contain "meaningless gibberish," *Yale Broadcasting Co., supra* at 598.

a Senate Subcommittee held extensive hearings to discuss, and which people and media in Maine (except WMTW-TV) were debating. As the Commission itself concedes, these matters go to the heart of what constitutes a controversial issue of public importance. (p. 26a). Yet none of these factors were persuasive to the First Circuit which found *no* informational value in this context in the snowmobile ads. A decision which so sharply conflicts with the rationale underlying decisions of this Court should be reviewed and reversed.

II. The First Circuit's Decision Is an Erroneous Application of the Communications Act and the National Environmental Policy Act of 1969 On an Important Issue With Broad Ramifications.

The First Circuit, without any analysis, characterized the statutory history behind Section 315 as only "generalized congressional endorsements" which do not prove that the Commission acted contrary to statute when it exempted standard product ads from the fairness doctrine. (p. 12a). Moreover, the lower court rejected the argument that NEPA has any application to the fairness doctrine so as to require that opposing views be presented to ads for products which have a demonstrably significant adverse impact on the environment.[15]

The FCC has long recognized that whenever a licensee broadcasts discussion of any "public questions," the public interest requires fair and free competition for the presentation of opposing views. *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32, *rev'd. on other grounds*, 37 F.2d 993 (D.C. Cir. 1929), *petition for cert. dismissed*, 281 U.S. 706 (1930). This principle came to be in-

[15] The First Circuit erroneously stated that PIRG relied on Section 101(b) of NEPA. 42 U.S.C. § 4331(b). In fact, PIRG's primary reliance was on Section 102 of NEPA, 42 U.S.C. § 4332, particularly Sections 102(1), 42 U.S.C. § 4332(1), and 102(2)(F), 42 U.S.C. § 4332(2)(F), *neither* of which the lower court recognized.

corporated into the public interest standard of the Communications Act adopted in 1934. 47 U.S.C. §§ 307(a), 309(a), 310(b). In 1946 the Commission decided *Sam Morris*, 11 FCC 197, wherein it stated that "[t]he fact that the occasion for [a] controversy happens to be the advertising of a product [in that case, liquor] *cannot serve to diminish* the duty of the broadcaster to treat it as such an issue." *Id.* at 199 (emphasis added). Contrary to the ruling upheld by the First Circuit here, the Commission recognized that "under some circumstances" product ads can "divide the community by raising basic and important social, economic, or political issues." *Id.* at 198. Hence, when in 1949 the FCC formalized the fairness doctrine in a single document entitled *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249-1250, it reaffirmed the principle that the fairness doctrine fully applies to "all subjects of substantial importance to the community" with specific reference to *Sam Morris*.

While there are no reported product ad cases between 1949 and the 1959 Congressional amendment to Section 315 which codified the fairness doctrine, in 1952 the FCC Acting Chairman reported to Congress that the fairness doctrine must be understood as applying to product ads under some circumstances:

> [W]hat is for some individuals merely a routine advertising 'plug' extolling the virtues of a [product], essentially no different from other types of products advertised, is for other individuals the advocacy of a practice which they deem to be detrimental to our society . . . the fact that the occasion for the controversy happens to be the advertising of a product *cannot serve to diminish* the duty of a broadcaster to treat it as [a controversial issue of public importance]. *Hearings on S.2444 Before the Senate Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 7 (1952) (emphasis added).

During the debates on the 1959 amendments to Section 315, several members of Congress remarked that the fairness doctrine was "intended to encompass all legitimate areas of public concern which are controversial." 105 Cong. Rec. 17831 (Sen. Scott).[16] No attempt was made to upset the FCC's ruling that product ads—the major source of revenue for the industry—were subject to fairness obligations in some circumstances. Thus, the final legislative product in Section 315 expressed a clear and binding intent to *continue* the application of the fairness doctrine to all controversial issues, including the social utility of a product as advanced in product ads. The First Circuit erred in reading this legislative history.[17] *Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission,* 67 Colum. L. Rev. 1470, 1474 (1967).

Since 1959, the Commission has reaffirmed the general rule that the fairness doctrine does apply to product advertising. In its *Public Notice on Controversial Issue Programming—Fairness Doctrine,* 25 P & F Radio Reg. 1899, 1900 (July 26, 1963), the FCC stated that "[i]n determining compliance with the fairness doctrine [it]

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[16] *See also* 105 Cong. Rec. 14457 (Sen. Douglas); 105 Cong. Rec. 14462 (Sen. Pastore); S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

[17] The First Circuit erroneously accepted the Commission's argument that "[w]hen the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission." *Red Lion, supra,* 395 U.S. at 385. Certainly, Congress could not have been presumed to have ratified the myriad applications of the fairness doctrine to every particular fact situation. It is equally clear, however, from this Court's reference to the absence of a "free hand for the future" and from the legislative history of the 1959 amendments, that Congress did not intend to permit the Commission to undercut the broad general principles behind the fairness doctrine by either excluding from it certain controversial issues of public importance or else by carving out special rules for product ads.

looks to substance rather than to label or form."[18] The general principle was applied to cigarette ads in 1967, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 FCC2d 921 (1967), and of course, as previously mentioned, reaffirmed by every lower court decision that addressed the matter—with the exception of the First Circuit opinion at bar. Most significantly, Congress has expressly refused to pass legislation which would exempt product ads from the fairness doctrine and Section 315.[19] "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). *See also Red Lion, supra*, 395 U.S. 381-382. The First Circuit gave no reasons why it departed from these principles of legislative interpretation in upholding the wholesale exclusion of all standard product advertising from the fairness doctrine.

The lower court also dismissed in one paragraph the serious claim that NEPA requires the application of the fairness doctrine to ads for products with demonstrably significant adverse health and environmental consequences. Assuming the First Circuit was correct in deciding that the FCC could retreat from a general rule

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[18] The 1963 Public Notice was further explained in 1965 by FCC Chairman Henry and Commissioner Cox as recognizing that "[i]t is immaterial whether a particular program is . . . a paid announcement. . . . Regardless of label or form, if one viewpoint on a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints." *Mrs. Madelyn Murray*, 40 FCC 647, 648 (1965) (concurring opinion). *See also Living Should Be Fun*, 33 FCC 101 (1962) wherein "programs" which were thinly disguised facades for product advertising were subjected to the fairness doctrine.

[19] H.R. 11531, 90th Cong., 1st Sess. (1967); H.R. 11615, 90th Cong., 1st Sess. (1967); H.R. 11617, 90th Cong., 1st Sess. (1967); H.R. 381, 91st Cong., 1st Sess. (1969).

that the fairness doctrine applies in appropriate instances to advertising for any product, the lower court erred when it refused to recognize that Congress did not intend to exclude the fairness doctrine from its express directive that "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [NEPA]." 42 U.S.C. § 4332(1). *See also* 42 U.S.C. § 4332(2)(F). If the FCC's application of the fairness doctrine is statutorily and constitutionally permissible, *Banzhaf*, *supra*, then NEPA requires that the doctrine and Section 315 be fully extended to cover products which are at the core of important public controversies and which have serious adverse environmental consequences. The Commission's decision, affirmed by the First Circuit, deprives the public of vital information concerning the desirability of purchasing and using these products.

The First Circuit's decision represents an enormous setback to informing the public in those situations where there is a controversial issue of public importance over the sale and use of a product. The First Circuit destroyed the applicability of the fairness doctrine by accepting the FCC's arguments that since *all* products are *somewhat* controversial, then it is *never* possible for debate over the social utility of *any* product to rise to the level of a controversial issue of public importance.[20] Under the lower court's ruling, stations in Detroit, Michigan are free to air commercials for guns and ammunition, licensees in Richmond, Virginia can air ads for abortion services, and broadcasters in Portland, Maine can air ads

[20] This "floodgates" argument is much like saying that because all issues can be considered somewhat controversial in some context, no issue can ever rise to the level of being a controversial issue of public importance according to the guidelines set forth by the FCC. *1974 Fairness Report*, *supra*, 39 Fed. Reg. at 26376. That interpretation would, of course, totally destroy the fairness doctrine.

for snowmobiles, without providing contrasting views, even if the sale and use of those products (or services) is one of the most important controversies in any of those locales. One can next imagine the FCC extending this ruling to ads on behalf of candidates by concluding that the fairness doctrine does not apply to allow spokespersons for opposing candidates to obtain airtime because the first candidate's ad contained merely a "meaningless" message that he or she should be elected for being a decent person. In light of the First Circuit's erroneous interpretation of legislative history, which has resulted in the elimination of the public's right to receive information on controversial issues that can arise about particular products, the lower court's ruling should be reviewed and reversed.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 74-1434

PUBLIC INTEREST RESEARCH GROUP, ENVIRONMENTAL LAW INSTITUTE, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

ON REVIEW FROM THE FEDERAL COMMUNICATIONS COMMISSION

Before
MCENTEE AND CAMPBELL, *Circuit Judges,*
TAURO, *District Judge.**

Thomas R. Asher for petitioners.

John E. Ingle, Counsel, Federal Communications Commission, with whom *Ashton R. Hardy,* General Counsel, *Joseph A. Marino,* Associate General Counsel, *Jack David Smith, Jr.,* Counsel, and *Robert B. Nicholson,* Attorney, Department of Justice, were on brief, for respondents.

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* Sitting by designation.

Ellen Shaw Agress on brief for Environmental Action, Friends of the Earth, The Massachusetts Audubon Society, Environmental Policy Center, Council on Economic Priorities, Project on Corporate Responsibility, Center for Science in the Public Interest, Public Media Center, Action for Children's Television and National Citizens Committee for Broadcasting, amicus curiae.

August 18, 1975

CAMPBELL, Circuit Judge. The question in this case is whether a Maine television station, having broadcast paid advertisements for snowmobiles, must air the viewpoints of those who hold that snowmobiles are environmentally destructive, dangerous, noisy and offensive. The Federal Communications Commission, construing its recently revised fairness doctrine, has ruled not. *Peter B. Herbst*, 48 F.C.C. 2d 614, *reconsideration denied*, 49 F.C.C.2d 411 (1974), stating that the ads were "standard product commercials" which were not devoted in an "obvious and meaningful way" to the discussion of public issues. We are asked to set aside that decision.[1]

On January 10, 1973, several viewers resident in Maine wrote to WMTW-TV, a local station. They protested Ski-Doo, Rupp, Alouette and Harley-Davidson ads that were being shown at prime viewing times. As they saw it, the ads presented,

> "basically one viewpoint regarding the sale and use of snowmobiles in Maine and greater New England: that snowmobile ownership and use is associated with the good life and should be encouraged, with individuals and families, without fear of one's own

[1] Our jurisdiction to review a final order of the Commission is set forth in 28 U.S.C. § 2342 and 47 U.S.C. § 402(a).

> safety at high speeds, often over hilly terrain, and without any conscious consideration of wildlife, vegetation, ecological balance, noise, or safety of others on public lands, or private lands where snowmobile users are illegally trespassing." [2]

The letter spoke of testimony before a Senate subcommittee that the upsurge in snowmobile use threatened the environment, safety, property and wildlife, and caused vandalism and noise. In Maine, the letter pointed out, a controversy raged over proposals before the state legislature for regulation of snowmobile use, speed, noise and the like. Complainants charged that advertisements promoting "unrestricted product uses" did not refer to "other viewpoints on the product uses or of the problems involved." The snowmobile commercials presented "but one side of the important controversy."

Citing *Friends of the Earth* v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971) and *In re Wilderness Society*, 30 F.C.C. 2d 643 (1971), *upon reconsideration*, 31 F.C.C.2d 729 (Sept. 23, 1971), the authors asserted that there was "a controversy in your service area regarding snowmobile use." This being so, the "fairness doctrine" was said to impose a duty upon WMTW to present other sides of the controversy (though not necessarily to grant equal time).

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[2] The text of the ads (which, as complainants remind us, does not convey the zooming noises and video images) contained language such as: "The new look of power . . . . Tested under conditions that would turn an ordinary machine into a spinning disaster." "Rugged and beautiful as the great outdoors." "Whisper jet." "We'll be riding high . . . . We're goin' to pass them by." "Could your snowmobile take punishment like this and then come back for more?" "See who runs quiet. See who packs the power." "Trail rides two people." "A power plant without equal." "The best in family fun. . . . On a Polaris winter is just one big fun-filled season." "It's a family affair." "New Ski-Doo quiet." "The only snowmobile in the country that meets the legal noise limit proposed for 1974. It's a giant step ahead of the law." "New safety" on "the machine that changed winter."

Complainants suggested that the station air numerous spots at "strategic prime time" presenting all bona fide views on the snowmobile issue.

When WMTW did not respond promptly, the authors filed a formal complaint before the Federal Communications Commission. They elaborated upon the contention that snowmobiles were unsafe, and that injuries resulted from imprudence, alcohol, and driving in prohibited areas. Television ads were said to foster such excesses by encouraging "increased horse power and speeds and wide-open use over unknown and hilly terrain." Although the Maine legislature was studying limits on horsepower, speed and noise, the public, it was said, heard only one side. Meanwhile, the number of snowmobiles in Maine had increased from 54,000 in 1971 to 75,000 in 1973.

In addition to safety problems, snowmobiles were said to stir controversy over the extent of ecological harm (plantlife, some say, is biologically used to being undisturbed in winter), and over injury to property (snowmobiles are alleged to encourage wanton trespassing on the land of others). The Commission was asked to act with speed because the Maine legislature would be in session only briefly and public information was needed on all sides of the pending snowmobile legislation.

After the complaint was filed, WMTW answered that the fairness doctrine was not in issue, and that the ads did not advocate snowmobile misuse. Complainants promptly responded that the issue was not "misuse": "Whether 'misuse,' 'abuse,' 'proper use,' or any other term is used, these ads present only one side of a controversial issue of public importance. . . ." WMTW did offer to air, and aired, a single half-hour discussion program having to do with pending snowmobile regulatory legislation. However, complainants took the position that this one program could not offset five months of repeated and continuous ads.

The Commission's staff rejected the complaint. There followed review proceedings before the full Commission, during which, for the first time, the texts of the snowmobile ads were produced. The station asserted that they were conventional product ads. Complainants, on the other hand, maintained that they associated snowmobile use with "the good life" and encouraged a heady obliviousness of ecology, property rights and the public welfare.

The Commission eventually denied review of the staff report. By then the Commission had adopted and published its new fairness report, *Fairness Doctrine and Public Interest Standards*, 39 Fed. Reg. 26372, 48 F.C.C.2d 1 (1974),[3] after extensive inquiry into the fairness doctrine, ruling that standard product commercials which merely advocate the use of one product over another cannot be said to inform the public on any side of a controversial issue of public importance. The Commission stated that it would "apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." 39 Fed. Reg. at 26374, 48 F.C.C.2d at — . Referring to that policy, the Commission in denying review in the instant case said that "hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainant's area. . . ."; still, the announcements in question were not devoted "in an obvious and meaningful way to the discussion" of those issues, hence snowmobile advertisements did not raise one side of a controversial issue of public importance.

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[3] This is described as a "broad-ranging inquiry into the efficacy of the fairness doctrine," the first in almost 22 years. Written comments were solicited and panel discussions held. The twin considerations of Commission policy were said to be to foster uninhibited, robust, wide-open debate on public issues, and to maintain and stimulate a commercially based broadcast system. 39 Fed. Reg. 26372, 48 F.C.C.2d 1 (1974).

I

We deal initially with the suggestion of the Commission that, either under 28 U.S.C. § 2112(a) or under our inherent authority, we transfer the case to the District of Columbia Circuit for consolidation with *National Citizens Committee for Broadcasting* v. *FCC*, No. 74-1700. The latter proceeding, we are told, involves a broad review of the fairness report, including its product commercial policies. Given the desirability of uniform results and the special familiarity of the D.C. Circuit with communications problems, transfer seemed at first to be a plausible course. We accordingly invited supplemental briefing of the issue. Upon further consideration we are disinclined to transfer. The applicability of § 2112(a), as complainants point out, is far from clear, since the agency orders appealed from are altogether different. To be sure, the D.C. Circuit has jurisdiction to hear this case under 47 U.S.C. § 402(b), and this court has equitable power to transfer cases to a proper forum if it would serve the interests of judicial economy or convenience to the parties. But we cannot be confident that the ends of justice would be served by a transfer since the agency record in NCCB has yet to be filed in the District of Columbia, and indeed the Commission is now reconsidering the case. We thus do not know to what extent the present case would fit in with that proceeding. We are unwilling to project the complainants, against their wills, into such an uncertain future, even assuming the D.C. Circuit would be willing to accept consolidation. Thus, without deciding the question of the applicability of 28 U.S.C. § 2112(a), we decline to transfer.

II

When reviewing the substance of an agency decision, a court is limited to considering whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C § 706(2)(A), and to

measuring it against the twin external standards of statutory law and constitutional right, *id.* § 706(2)(B) and (C). We emphasize these standards at the outset, since this case turns as much or more upon observance of the respective functions of the court and agency as upon the merits of this interesting facet of the fairness doctrine controversy. *See generally* Ellman, *And now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 Cal. L. Rev. 1416 (1972).

We have no license to regulate broadcasting nor to impose our private views of the public welfare. What we must do is determine whether the Commission is acting within its lawful regulatory authority. In so doing, we shall first consider whether the Commission, judged in terms of its own procedures and precedents, past and present, has acted rationally and properly. Thereafter, we shall consider its actions in terms of statutory and constitutional law.

We begin by summarizing part of the fairness report, *see* note 3 *supra*, which explains the Commission's current policy and its departure in certain respects from earlier policy. The portion of the report dealing with paid announcements begins by quoting the Commission's pronouncements made in 1929, 3 F.R.C. Ann. Rep. 32 (1929), to the effect that although broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups, advertising is an "apparent" exception because without it, broadcasting would not exist. From this, the report deduces that "any consideration of the applicability of the fairness doctrine to broadcast advertising must proceed with caution" so as not to undermine the economic base of the system. (Otherwise, the report generally endorses and continues in effect the fairness doctrine.) The report then distinguishes "Editorial Advertising" from "Advertisements for Commercial Products or Services." It holds that the fairness doctrine

should apply to the former so long as the paid announcements present "a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance." [4] Turning to product advertisements, the report recognizes that many advertisements which do not look or sound like editorials are subject to fairness complaints because the business, product or service advertised is itself controversial. Reference is made to the Commission's "cigarette" ruling, *WCBS-TV*, 9 F.C.C.2d 921 (1967), *aff'd sub nom. Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969), where the Commission held—very much as complainants would like it to hold here with respect to snowmobiles—that cigarette commercials inherently raised a health issue, defined in terms of the desirability of smoking. The report goes on to state,

> "With the issue defined in this fashion, it was a simple mechanical procedure to 'trigger' the fairness doctrine. . . . It seemed to be clear enough that *all* cigarette advertisements suggested that the use of the product was desirable.
>
> . . . In retrospect, we believe that this mechanical approach to the fairness doctrine represented a serious departure from the doctrine's central purpose which, of course, is to facilitate 'the development of an *informed* public opinion'. . . . We believed that standard product commercials, such as the old ciga-

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[4] This test is aimed at elucidating a broadcaster's duties when faced with institutional advertisements of a subliminal type which appear to discuss public issues but may not do so explicitly. 39 Fed. Reg. at 26380, 48 F.C.C.2d at ——; *cf.* National Broadcasting Co. (Wilderness Society—Esso), 30 F.C.C.2d 642, *upon reconsideration*, 31 F.C.C.2d 729 (1971). *See also* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 777-78 (1972).

rette ads, make no meaningful contribution towards informing the public on any side of any issue."

Indeed, the report says, since the ads did not urge that cigarettes were good for health, a response that they were bad for health left the public with but one viewpoint.

The report went on to chronicle difficulties that arose when the D.C. Circuit refused to allow the Commission to treat the cigarette case as *sui generis*. In *Friends of the Earth* v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971), the court, reversing the Commission, ruled that the fairness doctrine could not logically be restricted to cigarette advertising. Advertisements extolling high-powered cars were held to trigger fairness obligations also, even though the commercials did not discuss the product in terms of the air pollution controversy. The Commission saw itself and the broadcasters as having been forced to engage "in the trivial task" of balancing commercials which contribute "nothing to public understanding."

The upshot of the 1974 report is that the FCC cigarette decision is overruled as Commission precedent—on the grounds that without meaningful substantive discussion such as that found in "editorial advertisements" the usual product commercial cannot reasonably be said to inform the public on any side of a controversial issue of public importance, and that application of fairness doctrines to product ads "tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion." Henceforth Commission policy will be to apply the fairness doctrine only to those commercials which "are devoted in an obvious and meaningful way to the discussion of public issues."

The present decision affecting snowmobiles conforms faithfully to the principles just summarized. It is true that it is open to the charge of nonconformity with two

earlier agency precedents: the 1967 cigarette case and *Sam Morris*, 11 F.C.C. 197 (1946) (dealing with liquor advertisements in partially dry areas). It was on the basis of inconsistency with these rulings that the D.C. Circuit required a reluctant Commission to apply the fairness doctrine to commercials advertising other controversial products—most notably, large automobiles. *Friends of the Earth* v. *FCC*, *supra*, 449 F.2d 1164. But these cases all preceded the current fairness report and rested on the court's determination that the Commission was not applying its own precedents in an evenhanded way.[5] The Commission has now repudiated these precedents, has announced a policy which would allow no such exceptions, and has done so with appropriate notice and, we believe, sufficient clarity of analysis. *See Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). We do not read *Friends of the Earth*, *supra*, or related cases decided in the D.C. Circuit (*see Neckritz* v. *FCC*, 502 F.2d 411, 418 (D.C. Cir. 1974)) as questioning the Commission's authority to shape a new course in this manner. In the absence of statutory or constitutional barriers, an agency may abandon earlier precedents and frame new policies. *See NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 264-66 (1974); *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967); *NLRB* v. *Wentworth Institute*, No. 74-1219 (1st Cir. March 31, 1975). Thus the decision's mere nonconformity with earlier agency precedent does not render it arbitrary and capricious.

Nor can we say that the decision reflects a policy which is so clearly irrational on its face as to be "arbitrary, capricious, an abuse of discretion." We distinguish be-

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[5] In Friends of the Earth v. FCC, 449 F.2d 1164, 1170 (D.C. Cir. 1971), the court held that the Commission could not "plausibly differentiate the case presently before us" from the cigarette case "[p]ending . . . a reformulation of its position."

tween irrationality and the more complex questions, discussed below, of whether the decision is within the Commission's statutory and constitutional powers. Applying fairness standards to product commercial [*sic*] raises obvious problems of administration and policy that are open to more than one solution, and the Commission's present solution, whether right or wrong, was arrived at carefully and is in line with the recommendations of commentators who have studied the problem. H. Geller, The Fairness Doctrine in Broadcasting, (1973); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 771-80 (1972). Unless the standard of rationality is to be narrowed to a circle no wider than a court's private judgments, we cannot rule that the Commission's policies here are "arbitrary, capricious, an abuse of discretion" within the meaning of section 706(2)(A).

We turn next to whether the Commission's exclusion of product commercials which are not facially controversial from fairness obligations is within its statutory authority. The fairness doctrine is not a creature of statute but was evolved over the years by the Commission under the "public interest" standard of the Communications Act. Thus complainants are able to point to little in the way of relevant legislation. Complainants argue that Congress, largely by acquiescence, has "codified" both the fairness doctrine and the Commission's former application of it to product ads. They contend that the fairness doctrine now applies to *all* controversial issues, and that since snowmobiles are controversial—especially when advertised at a time when their regulation was being debated in the Maine legislature—the agency acted illegally in declining to apply the doctrine.

But this argument assumes a degree of legislative specificity which simply does not exist. While Congress has been said to have acknowledged and generally endorsed

the Commission's adoption of fairness standards, it has legislated only once on any aspect of the doctrine, and then in an area totally divorced from the thorny issue of product commercials. *See* 47 U.S.C. § 315 (equal time doctrine applying to political candidates). In *Red Lion Broadcasting* v. *FCC*, 395 U.S.C. § [*sic*] 367 (1969), the Supreme Court held the constitutionality of the fairness doctrine as applied by the Commission to broadcasts involving personal and political criticism; and, in so doing, the Court pointed to evidence that, in amending section 315 of the Communications Act of 1934, Congress had approved the general tenets of the fairness doctrine. But it is a long step from *Red Lion* and the 1959 legislative statements cited therein, to a holding that the Commission is bound to interpret product commercials not explicitly discussing public issues as generating controversy to which fairness obligations attach. As the aftermath of the cigarette case suggests, there may be no practical stopping place if this approach is accepted; the court in *Friends of the Earth*, *supra*, foreclosed the luxury of a halfway approach. (Thus in the present case, if the Commission were to be impressed with the public importance of the snowmobile issue, it could now rule for complainants only at the cost of reopening what might seem like a pandora's box.) Given the necessity of product advertising in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in *Red Lion*, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine. We think Congress left questions of application and accommodation to the Commission under the general public interest standard; the Commission's present ruling is not so plainly inimical to the public interest as to be illegal.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94 (1972), Chief Justice Burger referred to the balancing of public and private interests in broadcasting as a "tightrope." He pointed to the established principle that the construction of a statute by the agency charged with executing it is entitled to deference, and stated on the related question of media access,

> "Congress has chosen to leave such questions [as media access] with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. . . ."

Id. at 122. Moreover, it is perfectly obvious from the extent of the disagreement in *CBS* as well as from recent decisions on the fairness doctrine that there are difficult problems with how and when it should be applied. Under such circumstances, there is particular reason to defer to the agency established to exercise supervision. As Chief Judge Bazelon has written,

> "I think there is a proper role for Commission 'expertise' or experience in the administration of the treacherous problems of determining what issues are raised by a broadcast and whether these issues are 'controversial.' The FCC has by now had 40 years of experience in dealing with telecommunications broadcasts. . . ."

National Broadcasting Sys. v. *FCC*, No. 73-2256 (D.C. Cir. June 2, 1975) (dissenting). We conclude that the Commission's current policy is within its statutory authority.

There is finally the question whether the Commission's policy violates the first amendment. Complainants argue that the fairness doctrine serves the first amendment by requiring airwave licensees to be true public forums for the presentation of divergent views. The essence of this

argument seems to be that the first amendment requires the fairnss doctrine either to be enforced to the hilt or to be supplemented by regulations designed to ensure access to the broadcasting media by all points of view. *Cf. CBS, supra* at 185-90 (Brennan, J., dissenting).

This approach does not seem to us to have commanded a majority of the Court (although, to be sure, *CBS* involved issues of access rather than fairness). Furthermore, we have doubts as to the wisdom of mandating, rather than merely allowing, government intervention in the programming and advertising decisions of private broadcasters. It is certainly possible to argue, as complainants suggest here, that "the uninhibited marketplace of ideas in which truth will ultimately prevail," *see Red Lion, supra*, 395 U.S. at 390, might be better served by a continued extension of the fairness doctrine to product advertising. But we do not view that question, in the short and long run, as so free from doubt that courts should impose an inflexible response as a matter of constitutional law.[6] We believe the first amendment permitted the Commission not only to experiment with full-scale application of the fairness doctrine to advertising but also to retreat from its experiment when it determined from experience that the extension was unworkable. In any event, at present we cannot say that the first amendment

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[6] The majority in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1972) has been characterized as having.

> "a deeply felt belief that the broadcasting system presents a special situation to which traditional constitutional doctrines should not be mechanically applied. Underlying this belief is a concern that the delicate interest balancing and complex administrative demands inherent in government regulation of broadcasting require that the public interest be entrusted to an expert agency equipped with broad discretion enabling it to develop flexible solutions unburdened by rigid constitutional standards."

The Supreme Court, 1972 Term, 87 Harv. L. Rev. 178 (1973); *cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973).

requires the Commission to force the presentation of alternate views in response to product advertisements which do not explicitly expound a point of view on a public issue.

Complainants further see a constitutional violation in differentiating commercials, unreasonably it is said, from all other forms of speech. But as we have previously said, the Commission's reasons for differentiation, which are explained in the fairness report, can hardly be termed irrational, whatever one's views as to their soundness. Furthermore, we see no vagueness in the new standards. They are, in fact, remarkably clear when compared with the distinctions that would have to be made were fairness standards to apply to product commercials generally.

Finally, the decision is challenged under section 101(b) of the National Environmental Policy Act, 42 U.S.C. § 4431(b), which states the congressional policy that the Government use "all practicable means consistent with other essential considerations of national policy," to protect and promote environmental quality. We hesitate to read this section of NEPA as imposing requirements upon the Commission's regulatory and licensing functions in the areas of program content and speech. Given the prohibition in section 326 of the Communications Act against Commission censorship, we do not believe that section 101 (b) of NEPA can be interpreted to compel the Commission to use its licensing power as a lever to impose special standards upon private licensees in the interest of the environment. *Cf. United States* v. *SCRAP*, 412 U.S. 669, 694-95 (1973).

Affirmed.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Complaint by PETER C. HERBST, JANET A. K. COOPER, AND MICHAEL D. COOPER, CAPE ELIZABETH, MAINE

Concerning Fairness Doctrine Re Station WMTW-TV

MARCH 16, 1973.

MR. PETER C. HERBST,
2 Kenyon Lane,
Cape Elizabeth, Maine 04107

DEAR MR. HERBST: This refers to your complaint of February 1 and 16, 1973, against Station WMTW-TV filed on behalf of Janet A. K. Cooper, Michael D. Cooper and yourself regarding the broadcast of snowmobile commercials.

COMPLAINT

You allege that as residents of the State of Maine you participate in various outdoor winter sports and, therefore, are concerned about "the rampant growth and virtually unregulated use of snowmobiles in this and other New England states." You state that on January 10, 1973 you wrote station WMTW-TV indicating your concern over the broadcast of various snowmobile commercials that,

> * * * sought to promote the widespread use of snowmobiles in the State of Maine and in the greater New England area without reference to such vital public issues as the need to prevent damage to vegetation and wildlife, noise and air pollution, safety

hazards to snowmobile users and others, violation of private property rights and abuse public land.

You state that the Maine legislature has conducted hearings on snowmobile regulation and that you requested station WMTW-TV to provide you with information relating to past programming "on the controversial issue" and inform you of "any plans that it had of rectifying this severe imbalance in its programming." You contend that the use of snowmobiles is of "broad public concern" and you refer to a study reported in *Consumer Reports* which covered three areas concerning snowmobiles, namely, (1) "the safety of the machines and their mode of use," (2) "the possible threat to the environment in the forms of plant and ground damage, threat to wildlife and vastly increased range of hunters, trappers and fisherman" and (3) "the need to protect the rights of property owners and others who are in the vicinity of snowmobiles as far as the problems of noise, trespassing, inadvertent property damage and deliberate vandalism are concerned." You also refer to a study entitled *Maine Snowmobile Owners* and to letters written to the editors of the *Portland Press Herald* and the *Maine Sunday Telegram* which relate to the above mentioned areas of study. You contend that station WMTW-TV "not only has failed to present all views on the environmental controversy, but it has affirmatively misled the public and snowmobilers themselves."

You state that the fairness doctrine applies to the commercials because an imbalance in WMTW-TV's programming occurs when the commercials showing snowmobile ownership and use present the "good life" without any "conscious consideration of wildlife, vegetation, ecological balance, noise, or safety of others on public lands, or private lands where snowmobilers are legally trespassing." You further state that because the public

and the legislature of the State of Maine have been subjected to the influence of snowmobile manufacturers who promote the "unfettered use" of their product, it is necessary that the Commission act promptly. You also state that the current inquiry into the fairness doctrine (Docket No. 19260, 30 FCC 26 (1971)) is irrelevant to the necessity for a decision in your particular situation. You request that the Commission order station WMTW-TV to comply with the fairness doctrine in light of its "public interest obligation arising out of its programming of snowmobile advertisements which seek to influence the public by presenting only one side of a controversial issue of public importance." In addition you request that the Commission order station WMTW-TV to pay you for your costs "in this matter and possible expenses for attorneys fees which might later be incurred."

In its reply to your January 10 letter, Station WMTW-TV stated (1) that it was its view that the commercials did not raise a fairness doctrine obligation and did not advocate a misuse of the product and (2) that, realizing there was legislation pending dealing with snowmobile regulation, it invited you to participate with other diverse spokesmen on a discussion program concerning snowmobiles. However, you allege in your second letter to the Commission on February 16, 1973, that you declined to participate because you were not seeking ". . . time for ourselves and since the station claims to be inviting various groups which will discuss, we hope, many of our concerns." In addition, you state that the station's response to your letter was an implicit refusal to ". . . supply us with the information which we desired about the ads; that, as a result, WMTW-TV is preventing a resolution of the issues you have raised; has made it necessary for you to contact the Commission "to solve essentially community problems of great import at the

community level"; and that WMTW-TV has "flagrantly violated its mandate to operate in the public interest by exhibiting a visible lack of good faith in this matter." You further state that station WMTW-TV has not denied your description of the snowmobile commercials, but "only contests an issue of law: whether the ads present one side of a controversial issue of public importance." You also allege that because WMTW-TV failed to deny your assertion that approximately "400 spots" were broadcast, you believe that your estimate is low. Thus, you request that the Commission not only fine WMTW-TV one thousand dollars for not providing the information you asked for, but also require that the information now be furnished to you. You further request that WMTW-TV be fined $100 for each day the information is not provided. You regard the one-hour discussion program as inadequate when compared to "200 minutes of spots over a five month period during heavily viewed times * * *" You reiterate your request for immediate relief and you request that the Commission "order" WMTW-TV indicate what it intends to do in the way of correcting the imbalance in its overall programming.

DISCUSSION

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require "equal time" be afforded each side but does require the license to afford reasonable opportunity for presentation of contrasting views in its overall programming, which includes news, discussion, interview programs, etc. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be in-

formed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

First, we note that you have not provided the Commission with any information which indicates that the licensee in its *overall* programming has failed to present contrasting views on the subject of snowmobiles. Although you request that the Commission "order" the licensee furnish information concerning timing, frequency, duration, complete texts, etc. of the snowmobile commercials, we do not require licensees to furnish material absent some such showing. Thus, a complainant must "(a) specify the particular broadcast in which the controversial issue was broadcast, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in its overall programming has not attempted to present opposing views on the issues." *Allen C. Phelps*, 21 F.C.C. 12 (1970), cf. *Democratic National Committee et al.* v. *F.C.C.*, —— U.S. App. D.C. ——, 460 F.2d 891 (1972).

Turning to the question whether the advertisements discussed a controversial issue of public importance, it would appear from your complaint that the snowmobile commercials do nothing more than advance a claim for product efficacy or social utility. Since they thus do not deal explicitly with one side of a controversial issue (See *Wilderness Society et al.* (Esso) 31 F.C.C. 2d, 29 (1971)), the issue is squarely the application of the fairness doctrine to ordinary product commercials. Although you have concluded that it is irrelevant to the necessity for a Commission decision in the instant case,

this issue is in fact under consideration in Section III of the Commission's current inquiry into the fairness doctrine (Docket No. 19260, 30 F.C.C. 26 (1971)). While our definitive ruling will issue in the docket, we must rule in this case on the basis of past precedents and what we deem to be common sense of the matter.

On this basis, we decline to apply the fairness doctrine to these ordinary product commercials. A contrary course would extend the applicability of the doctrine to virtually all products—e.g., beer, airplanes, cigars, detergents; would be chaotic and administratively a horror and indeed might even undermine the economic base of the broadcasting industry and thus its ability to serve the needs and interests of the listening public—a matter which we leave for final resolution to Docket No. 19260; and would not truly or effectively illumine the "issue of great public concern" as to which the broadcaster is obligated to devote a reasonable amount of time (*Red Lion Broadcasting Co.* v. *F.C.C.* 395 U.S. 367 (1969)). We do not read the *Friends of the Earth* case as requiring an extension of the fairness doctrine to virtually all ordinary product commercials; rather, the Court's holding there is limited to the particular advertisements and public health issues involved, and is expressly stated to be on the grounds that pending the outcome of an overall inquiry, the health hazard issue in *Cigarette Advertising* ruling cannot be distinguished from that in *Friends of the Earth.* You have presented no such indistinguishable public health hazard issue.

Accordingly, we conclude that the licensee has acted reasonably and in good faith in determining that the advertisements did not constitute a discussion of one side of a controversial issue of public importance.

In view of the foregoing, no further Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 74-934

In Re Complaint of PETER C. HERBST, ET AL.,
AGAINST STATION WMTW-TV, POLAND SPRING, MAINE

ORDER

(Adopted August 28, 1974; Released September 9, 1974)

BY THE COMMISSION: COMMISSIONER LEE, REID AND WASHBURN ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review of the Broadcast Bureau's ruling of March 16, 1973 (40 FCC 2d 115), filed April 16, 1973 by Peter C. Herbst, *et al.;* an opposition to the Application filed by WMTW-TV on April 27, 1973; correspondence dated November 5 and 12, and December 21, 1973 from the licensee in response to the October 5, 1973 Bureau's letter of inquiry; and complainants' reply dated November 26, 1973 to the licensee's correspondence of November 5 and 12, 1973.

2. We have examined all the pleadings herein and believe that the Bureau's ruling was correct. However, we believe some comment should be made concerning one specific allegation set forth in the Application for Review. Complainants state that their complaint was denied in part because of their failure to set forth sufficient facts necessary to establish a *prima facie* fairness doctrine case. Complainants contend that they met the burden set forth

in *Allen C. Phelps*, 21 FCC 12 (1969), for establishing a fairness doctrine case when they monitored the station "for many hours, over many weeks" and specified the times that the snowmobile advertisements were broadcast, the sponsors of those broadcasts, and the issues discussed by the advertisements. Complainants state that the Bureau's ruling of March 16, 1973 was in error in determining that they had failed to establish a *prima facie* fairness doctrine case because they had not provided the Commission with any information which indicated that the licensee in its overall programming failed to present contrasting views on the subject of snowmobiles.

3. In the report on the Commission's recently completed inquiry into the fairness doctrine the Commission reaffirmed the *Phelps* requirement "that a complainant state the 'basis for the claim that the station has presented only one side of the question' ", and stated:

> This does not require . . . that the complainant constantly monitor the station. Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs, and other nonentertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. . . . Also the assumption that a station

> has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their listening or viewing habits, and should indicate the period of time during which they have been regular members of the station's audience. *Fairness Report*, 39 Fed. Reg. 26372, 26379 (1974).

On the basis of the complainants' statement, they appear to have listened to the station sufficiently for the purpose of determining whether the licensee presented contrasting views on the subject of snowmobiles, and therefore the Bureau's language on this particular point is erroneous.

4. However, the primary basis for the Bureau's ruling was that the complainants failed to show that the announcements discussed one side of a controversial issue of public importance, and unless this is established it is immaterial whether contrasting views on the subject of "snowmobiles," as such, were presented. Complainants claim that the message of the snowmobile announcements was "that snowmobile ownership and use is associated with the good life and should be encouraged . . . without fear" of the individual and environmental hazards, and that this constitutes the presentation of one side of the controversial issue of snowmobile use so as to engender fairness doctrine obligations. All product advertising extolls the virtues of the product in order to convince the public to buy. That is the object of advertising which forms the economic base of the broadcasting industry. The Commission has stated that it will not extend the fairness doctrine to "general product advertisements such as those making claims regarding a product's efficacy or social utility" unless the advertisements directly or by necessary inference address a controversial issue of public importance. *Na-*

tional Broadcasting Company (*Wilderness Society-ESSO*), 30 FCC 2d 643 (1971); *Alan F. Neckritz, et. al.*, 37 FCC 2d 528 (1972), affirmed sub. nom. *Alan F. Neckritz, et al.* v. *FCC*, —— F 2d —— D.C. Cir. Case No. 71-1392, June 28, 1974). This policy was affirmed in the *Fairness Report, supra*, where we stated that standard product commercials which merely advocate the use of one product over another cannot "realistically be said to inform the public on any side of a controversial issue of public importance," and therefore the Commission "will apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Fairness Report, supra.*[1] While hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainants' area, it cannot be said that the announcements in question "are devoted in an obvious and meaningful way to the discussion" of those issues. Therefore the March 16 ruling was correct in determining that the snowmobile advertisements in question did not raise one side of a controversial issue of public impor-

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[1] In affirming this policy we held that the rationale of the "cigarette case," *WCBS-TV*, 9 FCC 2d 921 (1967), affirmed sub. nom. *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1969), would no longer be observed as a precedent. Thus, we stated: ". . . While such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine.[22]

"[22] . . . If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it 'to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the public health . . .' " *Fairness Report, supra*, at 26381."

tance, and the additional material submitted by the complainants with their Application for Review does not show otherwise.

5. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 74-1152

In Re complaint of PETER C. HERBST, ET AL.,
AGAINST STATION WMTW-TV, POLAND SPRING, MAINE

ORDER

(Adopted October 22, 1974; Released October 25, 1974)

BY THE COMMISSION:

1. The Commission has before it a Petition for Reconsideration, filed September 13, 1974, by Peter C. Herbst, et al., of the Commission's September 9, 1974 denial of the Application for Review, filed April 16, 1973, of the Broadcast Bureau's ruling of March 16, 1973 (40 FCC 2d 115).

2. We have examined the Petition for Reconsideration and believe that the denial of the Application for Review was correct.

3. The Petition cites no erroneous findings of fact or conclusions of law in the Commission's order denying the Application for Review nor does it present any new facts or arguments. It merely states that in issuing the denial of the Application for Review the Commission "made express reference to certain pleadings before it, but did not mention other pleadings filed by the complainants, including letters of October 9, 1973 and January 7, April 15, and June 28, 1974," and requests that the Commission "reconsider its ruling for the reasons stated in all the

pleadings before it, and to make it clear that it has relied on all the pleadings."

4. At the time the Commission denied the Application for Review it was in reciept of the petitioners' letters of October 9, 1973, and January 7, April 15, and June 28, 1974, and these letters were taken into consideration in making the Commission's determination. However the information and arguments contained in those letters were contained in other letters or were not relevant to the issue upon which the denial was based, and therefore were not discussed or referred to in the order issued by the Commission.

5. In view of the fact that no new facts or arguments are presented, pursuant to Section 1.106 of the Commission's Rules and Regulations, the Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-724

PUBLIC INTEREST RESEARCH GROUP, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 522 F.2d 1060. The order of the Federal Communications Commission (Pet. App. 23a-27a) is reported at 48 FCC 2d 614. The order of the Commission denying reconsideration (Pet. App. 28a-29a) is reported at 49 FCC 2d 411. The related *Fairness Report* is reported at 48 FCC 2d 1.

JURISDICTION

The judgment of the court of appeals was entered August 18, 1975. The petition for a writ of certiorari was filed November 17, 1975 (November 16, 1975, was a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in ruling that television advertisements for snowmobiles are standard product commercials which do not meaningfully discuss controversial issues of public importance under the Commission's recent revision of its Fairness Doctrine.

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315, and Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, are set forth in the petition at pp. 2-3.

STATEMENT

The fairness doctrine requires broadcast licensees (1) to cover controversial issues of public importance, and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 111. The doctrine was developed by the Federal Communications Commission under its authority to regulate broadcasting in the public interest. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 375-386.

Several television viewers (including the two individual petitioners) complained to the Commission on February 1, 1973, that snowmobile commercials broadcast by station WMTW-TV in Poland Springs, Maine, had discussed one side of a controversial issue of public importance. The viewers asserted that the commercials had presented pro-snowmobile arguments and information at a time when public debate on snowmobiles was widespread. They asked the Commission to require WMTW-TV, pursuant to the fairness doctrine, to present contrasting viewpoints on the issue.

The Commission's Broadcast Bureau, acting under delegated authority,[1] found that the commercials did "nothing more than advance a claim for product efficacy or social utility," and did not deal explicitly with one side of a controversial issue, and it denied the complaint (Pet. App. 20a-21a).

The viewers applied to the Commission for review of the staff action.[2] While the application was pending, the Commission issued its *Fairness Report*. 48 FCC 2d 1, 39 Fed. Reg. 26372 (1974). In that *Report*, the culmination of a three-year study of the fairness doctrine, the Commission revised its policies for applying the doctrine to "paid announcements." The new policy for product commercials, in summary, is as follows (48 FCC 2d at 26, 39 Fed. Reg. 26382 (1974)):[3]

> In the absence of some meaningful or substantive discussion * * *, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. * * * Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

On application for review of the snowmobile ruling, the Commission considered the material[4] submitted by

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[1]47 U.S.C. 155(d); 47 C.F.R. 0.81.

[2]47 U.S.C. 155(d); 47 C.F.R. 1.115.

[3]Adoption of the new policy required abandonment of the Commission's earlier ruling that ordinary cigarette commercials may raise fairness doctrine obligations. *Television Station WCBS-TV*, 8 FCC 2d 381, 9 FCC 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842.

[4]The material included the texts of the snowmobile commercials (Pet. App. 5a).

the viewers and the station in the light of both precedent and the new policy, and concluded (Pet. App. 26a):

> While hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainants' area, it cannot be said that the announcements in question "are devoted in an obvious and meaningful way to the discussion" of those issues.

The Commission found that the staff had correctly denied the complaint, and subsequently denied reconsideration (Pet. App. 28a-29a).

On petition for review, the court of appeals unanimously affirmed the Commission's orders (Pet. App. 1a-15a). The court held that: (1) the decision "conforms faithfully" to the policies established in the *Fairness Report* (Pet. App. 9a); (2) in changing its policy on product commercials, the Commission merely repudiated "its own precedents" and did so "with appropriate notice" and "sufficient clarity of analysis" (Pet. App. 10a); (3) Congress, in amending Section 315 of the Communications Act,[5] had approved the doctrine generally, but had "left questions of application and accommodation to the Commission under the general public interest standard * * *" (Pet. App. 12a)[6]; and (4) the National Environmental Policy Act ("NEPA")[7] does not compel the Commission "to use its licensing

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[5]47 U.S.C. 315. The statute was amended in 1959. 73 Stat. 557.

[6]The court, in rejecting a constitutional argument which petitioners apparently do not raise here, also held that the First Amendment permits the Commission "not only to experiment with full-scale application of the fairness doctrine to advertising but also to retreat from its experiment when it determined from experience that the extension was unworkable" (Pet. App. 14a).

[7]83 Stat. 852, 42 U.S.C. 4321-4347.

power as a lever to impose special standards upon private licensees in the interest of the environment" (Pet. App. 15a).

ARGUMENT

1. Petitioners' suggestion that the decision below is in conflict with decisions of this Court (Pet. 11-15) is insubstantial. As petitioners concede, this Court "has never addressed the matter of the application of the fairness doctrine to product advertising" (Pet. 11).[8]

Similarly incorrect is petitioners' argument that the decision of the court of appeals conflicts with prior decisions of the United States Court of Appeals for the District of Columbia Circuit (Pet. 8-10). The four cases relied on by petitioners, all of which antedate the *Fairness Report*, do not hold that the fairness doctrine must be applied to product commercials.[9] Rather, those decisions reflected

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[8]Petitioners attempt to show an indirect conflict, citing language dealing hypothetically with snowmobiles, from the dissenting opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 317. The Court in that case held that a city transit system's *ban* on political advertisements on car cards did not violate the First Amendment. *A fortiori*, the decision supports the Commission's discretion not to apply the fairness doctrine to commercial product advertising. In *Bigelow* v. *Virginia*, 421 U.S. 809, also cited by petitioners, the Court overturned the criminal conviction of a newspaper editor for publishing an advertisement for an abortion clinic. But the Court in *Bigelow* did not hold that the newspaper could be required to publish either the advertisement itself or anti-abortion views in response to it. Indeed, the First Amendment bars compulsory application of a "fairness doctrine" to newspapers. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241.

[9]In *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), the court gave "cautious approval" to the cigarette commercial ruling, but did not hold that the Commission was required to apply the fairness doctrine. *Id.* at 1099. In *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A. D.C.), that court merely required the Commission to follow its cigarette

existing Commission precedent concerning the relation between the fairness doctrine and advertising.[10] As the court below held (Pet. App. 10a), the Commission, in the light of its experience and in the exercise of its primary responsibility for defining the public interest, expressly

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commercial precedent. Noting the Commission's pending fairness study, however, the Court stated:

> *Pending* * * * *a reformulation of its position,* we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170 (emphasis added).

In *Retail Store Employees Union* v. *Federal Communications Commission,* 436 F.2d 248 (C.A.D.C.), the court remanded for further proceedings a Commission grant of license renewal without hearing, determining, *inter alia,* that in light of *Banzhaf* and of national labor policy, the Commission had not given adequate analysis to fairness doctrine complaints based on department store commercials aired during a strike of store employees. *Id.* at 256-259.

In *Neckritz* v. *Federal Communications Commission,* 502 F.2d 411 (C.A.D.C.), the court affirmed the Commission's refusal to find fairness doctrine obligations arising from gasoline commercials. Chief Judge Bazelon, who wrote the opinions for the court in *Banzhaf* and *Retail Store Employees Union,* issued a separate statement as to why he voted to deny rehearing in *Neckritz.* Referring to the Commission's new *Fairness Report,* Chief Judge Bazelon stated:

> I am convinced that the case does not merit rehearing *en banc* * * *. [S]ince the decision by the panel in this case the FCC has issued a new statement of policy concerning the Fairness Doctrine and advertising, 39 Fed. Reg. 26372 (July 12, 1974), and * * * review of such statement is currently being sought in this Court in No. 74-1700. I believe that review is the proper vehicle to consider in the first instance the serious issues raised [with regard to the applicability of the doctrine to commercials].

502 F.2d at 419.

[10]In fact, in two of those decisions the court of appeals recognized that the Commission had authority to change its policy toward advertisements. See *Friends of the Earth* v. *Federal Communications Commission, supra,* 449 F.2d at 1170; *Neckritz* v. *Federal Communications Commission, supra,* 502 F.2d at 419.

and lawfully revised its policy in the *Fairness Report*. Its decision in this case was based on this change.[11]

2. Petitioners also argue that: (1) the 1959 amendment to Section 315 required the Commission to "continue" applying the fairness doctrine to product commercials (Pet. 15-18); and (2) NEPA requires that the doctrine be "fully extended" to cover advertisements for products which may affect the environment (Pet. 18-19). The court of appeals correctly rejected both of these contentions.

To begin with, Congress in 1959 could not have "ratified" or frozen into existence a Commission policy concerning advertisements because no such policy existed until the cigarette commercial decision in 1967.[12] Furthermore, this Court held in *Red Lion, supra*, that Congress in amending Section 315 had approved the general tenets of the doctrine, but that it had left questions of application and accommodation to the Commission.

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[11]Judicial review of the entire *Fairness Report* has been sought in *National Citizens Committee for Broadcasting* v. *Federal Communications Commission and United States of America*, C.A.D.C., No. 74-1700. However, that case is in abeyance, prior to briefing, pending Commission action on petitions for reconsideration of the *Report*.

[12]Petitioners err in relying on *Sam Morris*, 11 FCC 197 (1946), as the origin of the application of the fairness doctrine to commercials. First, the fairness doctrine itself was not articulated until 1949, three years after the *Sam Morris* decision, although the obligation to cover public issues fairly had always existed under the public interest standard. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). Second, in *Sam Morris* the Commission refused to grant relief on the basis of allegations that the licensee had aired one side of a controversial issue by presenting liquor advertisements. Third, the Commission's dictum that liquor commercials could raise controversial issues was based on the fact that almost half of the nighttime service area of the station was legally "dry." And fourth, the *Sam Morris* dictum was not once followed during the 13 years between its issuance and the 1959 amendments to Section 315.

395 U.S. at 380-386.[13] The court of appeals correctly found that the Commission's discretion in applying the doctrine had not been so narrowly constricted as petitioners urge.

Finally, NEPA does not obligate the Commission to require advocacy of the government's view or any other view on environmental issues.[14] Environmental issues of course may be controversial; traditional application of the doctrine takes that into account. But NEPA has not changed the threshold requirement that triggers the obligation to present contrasting views. Cf. *United States* v. *SCRAP*, 412 U.S. 669, 694-695. The importance of the issue alleged to have been discussed can have no bearing on the entirely different question of whether the issue was discussed. The court of appeals correctly found it reasonable for the Commission to determine that the snowmobile commercials had not meaningfully discussed any controversial issue.

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[13]See also *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, 412 U.S. at 122, where this Court stated that Congress had given the Commission the flexibility to experiment in the fairness area "with new ideas as changing conditions require."

[14]Established government policies should not be favored by special treatment under the fairness doctrine, whose purpose is to further robust, open debate. See Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 Col. L. Rev. 1083, 1099-1100, 1105 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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